



November 2021

Final Tip Credit Rules Released by Labor Department

By Carolyn D. Richmond, Glenn S. Grindlinger and Timothy A. Gumaer

On October 29, 2021, the Wage and Hour Division of the U.S. Department of Labor (DOL) published the last provisions of its “Tip Regulations Under the Fair Labor Standards Act,” also known as the [2020 Final Tip Rule](#).

As explained below, the rule finalizes revisions related to when an employer may take a tip credit under the Fair Labor Standards Act (FLSA) for those employees who perform both tipped and non-tipped duties.

Background

Since 1967, the DOL’s dual jobs regulation has recognized that an employee in a tipped occupation may perform related duties that are not directed to producing tips. In 1988, the DOL stated that an employer may take a tip credit against tipped employees for time spent in duties related to the tipped occupation even though such duties are not by themselves directed toward producing tips, such as cleaning tables, making coffee and occasionally washing dishes or glasses.

However, where a tipped employee spends a substantial amount of time – which the DOL has stated is in excess of 20% in a given shift – performing non-tipped work, no tip credit may be taken for the time spent performing such duties. This became known as the “80/20” rule.

2020 Final Rule

As we explained in an April 2021 [alert](#), Congress amended the FLSA in 2018 to prohibit

employers from keeping tips received by their employees, regardless of whether the employers take a tip credit.

In December 2020, the DOL published a final rule that implemented these amendments, which have now become known as the 2020 Final Tip Rule. They were set to become effective on March 1, 2021. However, in late February, after a change in Presidential administrations, the DOL delayed the effective date to enable the agency to further review the issues.

On April 28, 2021, the DOL implemented those provisions of the 2020 Final Tip Rule that address the keeping of tips, tip pooling and tip-related recordkeeping. Those provisions took effect on April 30, 2021. For a more in-depth understanding of those provisions, see our April 30, 2021 [alert](#).

At the same time the DOL implemented the above provisions, it announced that it was delaying the effective date of certain portions of the 2020 Final Tip Rule, including the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties, i.e., the 80/20 Rule.

Now, the DOL has finally announced those portions of the 2020 Final Tip Rule that address the application of the FLSA tip credit to tipped employees who perform both tipped and non-tipped duties.

2020 Final Tip Rule – Tip Credit

The DOL’s October 29, 2021 tip credit regulations state that an employer can take a tip credit only when the tipped employee is:

- Performing tip-producing work (i.e., any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips); **OR**
- Performing work that directly supports tip-producing work (i.e., work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work, such as, depending on the occupation, rolling silverware, making drink mixes, and stocking the busser station) so long as the tipped employee does not spend a “substantial amount of time” doing tip-supporting work.

A “substantial amount of time” means either:

- The directly supporting work exceeds a 20% workweek tolerance, which is calculated by determining 20% of the hours in a workweek for which the employer has taken a tip credit (time for which an employer does not take a tip credit is excluded in calculating the 20% tolerance); **OR**
- The directly supporting work exceeds 30 continuous minutes (time in excess of the 30 continuous minutes, for which an employer may not take a tip credit, is excluded in calculating the 20% tolerance).

The key difference between this new federal guidance and state law in New York is that, under New York’s 80/20 Rule, an employer cannot take a tip credit against a tipped

employee for time the tipped employee performed non-tip producing duties if such duties exceeded 20% of their shift. Now, with the federal regulation, an employer cannot take a tip credit against a tipped employee for the time the tipped employee performed non-tip producing duties if such duties exceed 20% of their entire work week, or, in the alternative, if the employee performs non-tip producing duties for more than 30 continuous minutes.

For example: a bartender – a tipped employee – arrives to work and clocks in at 4 p.m.:

- From 4 to 4:30 p.m., the bartender gets the station ready for the shift and slices and pits fruit for drinks and otherwise gets the station set up. The DOL’s regulations state that this side work directly supports their tip-producing work, i.e., serving drinks to customers.
- From 4:30 to 5 p.m., the bartender takes a meal break.
- From 5 to 5:15 p.m., the bartender attends a typical pre-shift meeting to discuss things such as specials and certain meals and drinks to promote.
- From 5:15 to 11 p.m. the bartender is tending the bar.

In this scenario, the employer can take a tip credit (assuming the employer complies with all other necessary prerequisites including providing notice to the employee) for the bartender’s work done from 4 to 4:30 p.m. because (a) it did not exceed 30 minutes, and (b) slicing and pitting fruits is work that directly supports the bartender’s tip-producing work. The bartender needs the prepared fruits to make certain drinks that will ultimately be served to customers that will (hopefully) provide the bartender with tips. From 4:30 to 5 p.m., the bartender takes a 30-minute unpaid

meal break. From 5 to 5:15 p.m., the employer can take a tip credit for the bartender's typical pre-shift meeting because (a) it is less than 30 minutes, and (b) the meeting's discussions directly supports the bartender's tip-producing work. From 5:15 to 11 p.m., the employer can take a tip credit against the bartender's wage because the bartender is engaging in tip producing work, i.e., making drinks, talking to guests, and, if the bar serves food, serving food to customers.

However, if the bartender did the side work from 4 to 4:30 p.m. and then went into a pre-shift meeting from 4:30 to 4:45 p.m., then the employer could not take a tip credit for this work because, although it is work that directly supports the bartender's tip-producing work, it exceeded 30 minutes.

State and Local Law

It is particularly important to remember that the DOL's guidance addresses the FLSA alone and does not supersede or overrule state and local laws regarding tip credits. This means it does not affect the application of additional tip

credit restrictions that may exist under state law.

For example, New York State's Hospitality Wage Order prohibits an employer from taking a tip credit if an employee spends more than two hours in any day performing non-tip producing work or performs non-tipped duties for more than 20% of the time on any given shift. Thus, even if an employee is typically customer facing, an employer may not take a tip credit against that employee's wages if during their shift they perform duties that do not directly support their tip-producing work if such work is performed for more than two hours or more than 20% of their shift, whichever is less.

For more information or questions about this Alert, please contact Carolyn D. Richmond at crichmond@foxrothschild.com or 212.878.7983, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com or 212.905.2305, Timothy Gumaer at tgumaer@foxrothschild.com or 646.601.7652, or any member of [Fox Rothschild's New York Labor & Employment Department](#).